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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

BARBARA ROYAL,

Plaintiff and Appellant,

v.

CALIFORNIA HOSPITAL MEDICAL
CENTER, INC., et al.,

Defendants and Appellants.

B202475

(Los Angeles County
Super. Ct. No. BC 355695)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Victor H. Person, Judge. Affirmed.

Law Offices of Michele A. Wilson and Michele A. Wilson, for Plaintiff and
Appellant.

Bonne, Bridges, Mueller, O’Keefe & Nichols, Carmen Vigil and Vangi M.
Johnson, for Defendant and Respondent.

Barbara Royal appeals from the summary judgment entered for defendant Gary Chen, M.D., in this action for medical malpractice. We affirm, holding that there are no triable issues of fact to show that Chen's treatment was below the standard of care or that his supposed failure to obtain Royal's informed consent to the partial amputation of her gangrenous foot caused her any harm.

FACTS AND PROCEDURAL HISTORY¹

On March 11, 2006, Dr. Gary Chen, an orthopedic surgeon at California Hospital Medical Center (the hospital), was consulted by another hospital physician, vascular surgeon Jose Spiwak, about patient Barbara Royal. Royal had been admitted to the hospital on March 2, 2006, with pain in her lower extremities, particularly in her right foot. Royal's primary care doctor, Cadrin E. Gill, had sent her there because he was concerned by a sharply decreased blood flow to her right foot that appeared to be the result of peripheral vascular disease. Before Chen was consulted, Spiwak recommended an angioplasty of Royal's right foot. She initially refused, but eventually relented, and the procedure took place on March 6, 2006. It was unsuccessful in correcting the blood flow problem, however, and by the time Chen was called in, Spiwak concluded that Royal's right foot was gangrenous and would likely require amputation.

When Chen became involved, he also concluded that amputation was required. Chen and other hospital physicians discussed the need for the procedure and its risks with Royal and her family, as reflected in the hospital's patient notes and Chen's notes. There was some initial resistance by Royal, particularly as to whether amputation should occur below the knee or just above the diseased portion of the foot. According to Chen's deposition testimony, Royal rescinded her initial consent on March 11. On March 17, after he again informed her of the risks and told her there was essentially no alternative,

¹ Contrary to the appellate rules, only a handful of Royal's factual and procedural references are supported by citations to the record. (Cal. Rules of Court, rule 8.204(a)(1)(C).) We exercise our discretion to overlook this defect.

she agreed to the procedure. On March 18, 2006, Chen successfully performed a partial or transmetatarsal amputation of Royal's foot.

Royal sued the hospital, Gill, and Chen for malpractice. The complaint's primary focus was on Gill and his failure to adequately and timely diagnose her condition in the weeks leading up to her hospitalization. Chen's liability was premised solely on his care and treatment after the gangrene had set in, along with his alleged failure to gain Royal's informed consent to the amputation.

Chen moved for summary judgment, contending the undisputed evidence showed he acted within the standard of care, obtained Royal's informed consent, and did not cause her any injury. The main support for Chen's motion was the expert witness declaration of Dr. Kendall S. Wagner, an orthopedic surgeon. Wagner reviewed Royal's medical records. The pathology report on her amputated foot showed it was gangrenous, meaning amputation was required. If not, the foot would eventually fall off on its own, creating a high risk of serious complications, ranging from loss of the entire leg to death. Delaying the surgery from March 11 until March 18 was proper because Royal and her family could not agree on the amputation and because it allowed the degree of tissue necrosis to become more definite in order to determine the minimum possible level of amputation. The amputation was properly performed and was successful, Wagner opined.

On the issue of informed consent, Wagner said the medical records showed that Chen and other physicians spoke with Royal several times about the need for, risks of, and alternatives to, amputation, and that Royal was noted to have understood and agreed to the procedure. The only possible alternative was to let the foot fall off on its own, which posed the risks described above. Chen ordered the nursing staff to obtain Royal's signature on the consent form. Even though Chen did not check to see whether this had been done, Chen properly relied on a presurgery checklist which showed that Royal's consent had been obtained.

On the issue of causation, Wagner repeated that gangrene set in before Chen's involvement, leaving Royal with only two choices – amputation or letting the foot fall

off. The latter course “would have caused her increased pain, and would have led to infection which would have threatened her entire right leg and indeed her life. [¶] Therefore, the pathology report confirming gangrene is conclusive evidence that had Dr. Chen not performed the transmetatarsal amputation, [Royal] would nevertheless be without her right forefoot today, and quite likely missing her entire right leg, or be dead. Thus, Dr. Chen cannot be said to have caused or contributed to [Royal’s] injuries. Quite the contrary, Dr. Chen performed a much needed surgery which saved [Royal’s] right leg, and possibly her life.”

Attached as exhibits to the motion were the notes of Chen and other physicians concerning their discussions with Royal about the need for amputation. Also included was a surgery consent form signed on Royal’s behalf by her sister, and a pre-operative form showing informed consent had been obtained verbally and in writing. Mildred Gonzales, the nurse who obtained the sister’s signature on the consent form, testified that when she went to get Royal’s signature, Royal was receiving morphine and was not sufficiently conscious. Because the sister was at the bedside and was listed as an appropriate emergency contact for Royal, Gonzales had the sister sign the form.

Royal opposed Chen’s motion with an expert witness declaration from Dr. James Leo, a specialist in internal medicine who was knowledgeable about peripheral artery disease, but was not a surgeon.² Leo’s declaration was aimed solely at Gill and the other physicians who treated Royal before Chen was consulted. Although Leo recounts excerpts from Chen’s depositions concerning the inability of Royal and her family to agree about amputation, at no point in Leo’s declaration does he venture an opinion that Chen did anything wrong. Instead, Leo opines that Nurse Gonzales breached the standard of care by failing to make sure that Chen had more recent discussions with Royal about the procedure and by having Royal’s sister sign the consent form. The only

² Chen objected to Leo’s declaration on the ground he was not qualified to offer expert testimony on the standard of care as it related to orthopedic surgeons. The trial court overruled the objection. Chen contends this ruling was error. Because we affirm based on the failure of Leo’s declaration to raise triable issues of material fact, we need not reach the issue.

other relevant evidence supplied with Royal's summary judgment opposition was the declaration of her sister, who claimed that a nurse asked her to sign the form while Royal was sleeping, that nobody had ever discussed the risks and alternatives with her, and that she was unaware she was consenting to the amputation. There was no declaration from Royal and the only portions of her deposition testimony in the record concerned her identification and description of photos taken of her foot before the amputation.

The trial court found that there were no triable issues of fact concerning a breach of the standard of care or causation, and granted Chen's motion for summary judgment.³

STANDARD OF REVIEW

Summary judgment is granted when a moving party establishes the right to the entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) In reviewing an order granting summary judgment, we must assume the role of the trial court and redetermine the merits of the motion. In doing so, we must strictly scrutinize the moving party's papers. The declarations of the party opposing summary judgment, however, are liberally construed to determine the existence of triable issues of fact. All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment. While the appellate court must review a summary judgment motion by the same standards as the trial court, it must independently determine as a matter of law the construction and effect of the facts presented. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.)

A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action if that party has shown that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subds. (o)(2), (p)(2).) If the defendant does so, the burden shifts back to the plaintiff to show that a triable issue of fact exists as to that cause of action or defense. In doing so, the plaintiff cannot rely on the mere allegations or

³ The action is apparently still pending against Dr. Gill.

denial of her pleadings, “but, instead, shall set forth the specific facts showing that a triable issue of material fact exists” (Code Civ. Proc., § 437c, subd. (p)(2).) A triable issue of material fact exists “if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted.)

Our first task is to identify the issues framed by the pleadings. (*Lennar Northeast Partners v. Buice* (1996) 49 Cal.App.4th 1576, 1582.) The moving party need address only those theories actually pled and an opposition which raises new issues is no substitute for an amended pleading. (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1342.)

DISCUSSION

1. There Are No Triable Issues on Breach of the Duty of Care

A plaintiff suing for medical malpractice must show: (1) the defendant physician’s breach of the appropriate standard of care; and (2) the breach was the proximate cause of the plaintiff’s injuries. These matters require expert evidence, which, in the summary judgment format, comes by way of declarations. (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606-607.)

Wagner’s declaration said, in essence, that by the time Chen was called in, Royal already had gangrene, amputation was the only reasonable alternative, and the amputation was properly performed. Therefore, on the issue of Chen’s actual rendition of medical care, we conclude that Wagner’s declaration met Chen’s initial burden and shifted to Royal the burden of raising a triable issue of material fact. Nothing in Leo’s declaration even remotely touches on this issue or otherwise offers an opinion that Chen’s medical treatment, including the amputation procedure, fell below the standard of care.

Royal tries to avoid this failure through the deposition testimony of vascular surgeon Spiwak, who was questioned about a presurgery ultrasound test that a Dr. Wilbur believed did not show significant arterial narrowing. Royal's reliance on this evidence is misplaced. First, Spiwak testified that he had a different opinion than Dr. Wilbur, and that the ultrasound was not clear. That opinion is not contradicted by any evidence. Second, any doubts as to the severity of Royal's condition were eliminated by the pathology report on her foot, which showed it was gangrenous. Third, if Royal wanted to challenge Wagner's opinion that amputation was required, her medical expert should have addressed that matter in his declaration. He did not. Finally, Royal did not mention this issue in her summary judgment opposition papers and only raised it for the first time at oral argument on the motion. As a result, we hold there are no triable issues of fact concerning a breach of the standard of care in regard to Chen's actual rendition of medical care.

2. *There Are No Triable Issues Concerning Causation Due to the Alleged Lack of Informed Consent*

Although Royal alleged only one cause of action for malpractice, it was separated by subheadings for "NEGLIGENCE" and "INFORMED CONSENT." The informed consent portion of her complaint alleges that Chen and the other defendants breached their duty of care by failing to adequately apprise her concerning her condition and the unspecified options available to her. Had she been properly educated, she alleged, she would not have "suffered an amputation." Accordingly, her consent was not informed.

Based on these allegations, Royal has alleged a negligence claim for lack of informed consent, not a battery claim, which is reserved for those cases where the patient has not consented at all. (See *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 324-325.) In negligent informed consent cases, a physician is liable only where the failure to disclose causes the injury. Causation is shown only if it is established that consent would not have been given if full disclosure had occurred. This means Royal must show under an objective standard that a reasonable, prudent person in her position would have

declined the procedure had they been fully informed. (*Wilson v. Merritt* (2006) 142 Cal.App.4th 1125, 1138.)

As discussed in our statement of facts, Chen testified that after Royal withdrew consent on March 11, she agreed to the surgery on March 17 after Chen discussed with her the need for and risks of the procedure. Chen's notes and those of other physicians also reflect discussions with Royal and her eventual consent to the procedure. Wagner reviewed these matters and concluded that Chen had fulfilled the standard of care in obtaining Royal's informed consent. This was sufficient to shift to Royal the burden of raising triable issues of material fact that she was not adequately informed about the procedure.⁴

Although Royal did not give her written consent, we are aware of no authority – and Royal cites none – that verbal consent is insufficient without written consent. Chen's evidence that he and other physicians explained the procedure and its risks to Royal, and that she consented to the amputation on March 17, is uncontradicted. Although the failure to obtain written consent may in some cases create problems of proof for a defendant doctor, here there is no declaration from Royal stating she did not give consent, informed or otherwise. The portions of her deposition testimony included in the record

⁴ Royal objected below that Wagner's declaration was not admissible because he was not qualified to offer an opinion as to what Royal actually understood or consented to. That objection was overruled, a decision Royal challenges on appeal. We conclude Royal has misconstrued Wagner's declaration. He did not offer an opinion that Royal in fact understood the nature and risks of amputation. Instead, he was opining that Royal was properly informed based on the evidence in the form of the physician and patient notes which reflected that fact. It was up to Royal to undermine the factual basis for Wagner's opinion by producing evidence that the discussions reflected in the notes did not take place. As set forth below, she did not. Accordingly, we affirm the trial court's evidentiary ruling.

Royal also complains that the trial court improperly weighed Wagner's declaration against Leo's. We again disagree. The trial court did not make a credibility determination as between the two competing declarations. It instead found that Leo's did not address Chen's alleged negligence.

do not address this issue. We therefore conclude there are no triable issues of fact concerning Royal's informed consent to the procedure.

We alternatively conclude that even if informed consent were lacking, there are no triable issues concerning causation. Royal offers no evidence, expert or otherwise, that a reasonable alternative to amputation was available. Once her foot became gangrenous, her options were a medically controlled amputation, or enduring a painful wait for her foot to fall off on its own, along with a greatly increased risk that she would lose the leg, or even her life. Under the applicable objective standard, no reasonable person would choose the latter course, and we therefore hold that even without Royal's informed consent, Chen caused her no harm.

3. *A Continuance to Conduct Discovery Was Not Warranted*

As part of her summary judgment opposition Royal submitted a declaration from her lawyer asking to continue the hearing in order to depose Dr. Gill's assistant, whose alleged negligence was a key part of the claim as to Gill.⁵ Royal contends a continuance was warranted for further discovery as to both Gill's assistant and Dr. Wilbur, who, as noted above, apparently believed Royal's arterial stenosis was not as significant as did Spiwak.

Under Code of Civil Procedure section 437c, subdivision (h), a continuance for further discovery shall be granted if the requesting party's affidavits show good cause. As to Gill's assistant, Royal does not explain, and we do not see, how he has any evidence to offer that is relevant to Chen's involvement. As to Wilbur, he was not included in the continuance application and was not mentioned at all until the summary judgment hearing. Even then, Royal mentioned him in order to raise triable issues on the standard of care and did not ask the court to continue the matter in order to take his deposition. Accordingly, we see no grounds for reversal based on this issue.

⁵ The record does not show that the court ever formally ruled on that application. We treat the continuance request as having been denied.

DISPOSITION

For the reasons set forth above, the summary judgment is affirmed. Respondent shall recover his appellate costs.

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RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BAUER, J.*

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.